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State v. Nelson Appellant's Reply Brief Dckt. 42984

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 42984
)	
v.)	BONNEVILLE COUNTY
)	NO. CR 2013-14727
DAN RAY NELSON,)	
)	REPLY BRIEF
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

**HONORABLE JON J. SHINDURLING
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

After a jury trial, a jury found Dan Ray Nelson guilty of sexual battery of a minor child sixteen or seventeen years old. Mr. Nelson appealed, asserting his right to a fair trial, guaranteed by the United States and Idaho Constitutions, had been violated because of the prosecutor's misconduct. Specifically, Mr. Nelson asserted the prosecutor struck multiple "foul blows" during closing argument by impermissibly vouching for the investigating officer and the prosecutor and by appealing to the emotion, passion or prejudice of the jury, and this prosecutorial misconduct amounted to fundamental error.

In its Respondent's Brief, the State contended Mr. Nelson did not show fundamental error in the prosecutor's closing argument, because the prosecutor did not commit impermissible vouching or appeal to the emotion, passion or prejudice of the jury. (See Resp. Br., pp.4-11.) This Reply Brief is necessary to address the State's arguments, which are unavailing.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Nelson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the State violate Mr. Nelson's constitutional right to a fair trial by committing multiple acts of prosecutorial misconduct during closing argument?

ARGUMENT

The State Violated Mr. Nelson's Constitutional Right To A Fair Trial By Committing Multiple Acts Of Prosecutorial Misconduct During Closing Argument

A. Introduction

Mr. Nelson asserts the State violated his right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, by committing multiple acts of prosecutorial misconduct during closing argument. Mr. Nelson asserts the prosecutor committed misconduct during closing argument by vouching for the credibility of the investigating officer and the prosecutor and by appealing to the emotion, passion or prejudice of the jury. These prosecutorial “foul blows” committed during closing arguments amounted to fundamental error and this Court should vacate Mr. Nelson’s conviction in light of the misconduct.

B. Fundamental Error Occurred In This Case When The State Violated Mr. Nelson's Constitutional Right To A Fair Trial By Committing Multiple Acts Of Prosecutorial Misconduct During Closing Argument

Mr. Nelson asserts the prosecutor committed misconduct, in violation of Mr. Nelson’s constitutional right to a fair trial, by vouching for the credibility of the investigating officer and the prosecutor and by appealing to the emotion, passion or prejudice of the jury. The error plainly existed, and the misconduct prejudiced Mr. Nelson. Thus, fundamental error occurred in this case. See *State v. Perry*, 150 Idaho 209, 227 (2010); *State v. Gross*, 146 Idaho 15, 22 (Ct. App. 2008).

The State argues Mr. Nelson has not shown fundamental error in the prosecutor's closing argument. (See Resp. Br., pp.4-11.) The State's arguments are unavailing.

The first prong of fundamental error review here asks whether the prosecutor violated Mr. Nelson's constitutional right to a fair trial by committing misconduct. See *Perry*, 150 Idaho at 226-27. Mr. Nelson asserts the prosecutor committed misconduct by vouching for the credibility of the investigating officer and the prosecutor and by appealing to the emotion, passion or prejudice of the jury.

1. Vouching For The Credibility Of The Investigating Officer

Mr. Nelson asserts the prosecutor committed misconduct by vouching for the credibility of the investigating officer. Specifically, the prosecutor vouched for the credibility of Detective John Marley by expressing a personal belief as to the credibility of Detective Marley that was not based on inferences from evidence presented at trial. The prosecutor urged the jury to believe Detective Marley not because of the evidence presented at trial, but "because the absurdity to suggest Detective Marley would lie about this makes my skin crawl." (See Tr., p.493, Ls.5-8.) The prosecutor expressed his personal belief as to the credibility of Detective Marley, and that personal belief was based not on inferences from evidence presented on trial but on the prosecutor's own visceral reaction. See *State v. Adamcik*, 152 Idaho 445, 481-82 (2012).

The State contends the prosecutor's argument was proper, because there was nothing in the argument "suggesting it was based on anything other than the evidence." (Resp. Br., p.7.) However, the State ignores the distinction the prosecutor drew between his attempt to walk through the interview "very objectively," i.e., based on the

evidence presented at trial, and the prosecutor's own subjective response, namely that "the absurdity to suggest that Detective Marley would lie about this makes my skin crawl." (See Tr., p.493, Ls.1-8.) Thus, the prosecutor expressed that his personal belief as to the credibility of Detective Marley was based not on inferences from evidence presented on trial but on the prosecutor's own visceral reaction. See *Adamcik*, 152 Idaho at 481-82. Thus, the prosecutor committed misconduct. See *Gross*, 146 Idaho at 19-20.

2. Vouching For The Prosecutor And The Investigating Officer

Mr. Nelson further asserts the prosecutor committed misconduct by vouching for himself and the investigating officer. Specifically, the prosecutor's comments on how "we can do a better job" in coming up with a lie aligned Detective Marley with the prosecutor and emphasized the prosecutor and the witness were working together on the same team. The prosecutor argued both he and the investigating officer were capable of telling "better" lies, and therefore the jury should believe the account of the prosecutor and Detective Marley. (See Tr., p.494, L.13 – p.495, L.1.) By aligning the witness with the prosecutor, the prosecutor's comments on being capable of telling a better lie argued that the jury should believe the prosecutor and Detective Marley because they were representatives of the State, inducing the jury "to trust the Government's judgment rather than its own view of the evidence." See *United States v. Young*, 470 U.S. 1, 18-19 (1985). Further, by declaring that he and the investigating officer could do a better job in lying, the prosecutor expressly referred to facts not in evidence. See *Gross*, 146 Idaho at 20.

The State argues that the prosecutor's argument "was a proper argument for the jury to apply its common sense and experience in evaluating whether Detective Marley's testimony regarding [Mr.] Nelson's confession was a lie or the truth," and that "in context the 'we' used by the prosecutor is apparently a reference to the prosecutor and the jurors being able to come up with a better lie than the detective allegedly did." (Resp. Br., pp.8-9.) The State's argument appears to be based on a misapprehension of what the prosecutor actually said. The prosecutor's comments did not happen in the context of any reference to the jurors being able to come up with a better lie. Rather, the prosecutor's made the comments to the jury in the context of whether "[Detective] Marley's lying to you." (See Tr., p.494, Ls.13-18.) The prosecutor argued: "Well, if he's lying to you—I don't mean to sound terrible, but I can do a better job. I mean, if you want me to lie to you, we can do a better job. Okay?" (Tr., p.494, Ls.18-21.) Regarding Detective Marley, the prosecutor later argued, "[a]nd to suggest he's lying about something, when the lie could easily have been much better" (Tr., p.494, L.25 – p.495, L.1.)

Thus, nothing in the context of the prosecutor's comments suggests the prosecutor was referring to the jurors being able to come up with a better lie. The prosecutor's comments that Detective Marley could do a better job lying and that the prosecutor himself could do a better job lying (see Tr., p.494, L.13 – p.495, L.1), instead indicate the prosecutor's use of "we" was to align Detective Marley with the prosecutor and emphasize the prosecutor and the witness were working together on the same team. Thus, the prosecutor's comments were misconduct. See *Young*, 470 U.S. at 18-19; *Gross*, 146 Idaho at 20.

3. Appealing To The Emotion, Passion Or Prejudice Of The Jury

Additionally, Mr. Nelson asserts the prosecutor committed misconduct by appealing to the emotion, passion or prejudice of the jury. Specifically, the prosecutor invited the jury to imagine themselves as the alleged victim. By inviting the jury to step into the shoes of the alleged victim, C.F., at the time he reported the alleged offenses to the forensic interviewer, the prosecutor urged the jury to find Mr. Nelson guilty based on imagining themselves being placed in C.F.'s position and their resulting sympathy for him. See *Commonwealth v. Cherry*, 378 A.2d 800, 804-05 (Pa. 1977); *Commonwealth v. Olmande*, 995 N.E.2d 797, 801 (Mass. App. 2013); *State v. McDaniel*, 462 S.E.2d 882, 883-84 (S.C. Ct. App. 1995). Those comments improperly appealed to the emotion, passion or prejudice of the jury through the use of inflammatory tactics. See *Gross*, 146 Idaho at 20-21.

Relying on *Lopez v. Langer*, 114 Idaho 873 (1988), the State contends the prosecutor's argument, "made in relation to the victim's credibility, was a proper argument based on the jury's common sense and life experiences, and not a call to sympathize with the victim." (Resp. Br., pp.9-10.) However, *Lopez* does not justify the prosecutor's improper comments in this case.

Lopez was a civil case centering on whether the defendant was the owner of a car for purposes of extending tort liability for a fatal accident under the theory of negligent entrustment. *Lopez*, 114 Idaho at 874. The defendant, on the advice of his attorney, had endorsed and delivered the title of the car to another party, but the other party did not register the vehicle in her name after receiving the title. *Id.* at 874-75. In closing argument, regarding the reasonableness of the defendant's actions, defense

counsel asked the jury to place themselves in the same position as the defendant with respect to the alleged transfer of title. See *id.* at 878. The Idaho Supreme Court held that such “golden rule” arguments are “*only* appropriate when used to ask the jury to assess the reasonableness of a party’s actions by relying upon their own common sense and life experiences.” *Id.* (emphasis added).

Here, the State confuses asking a jury, in a civil case, to assess the reasonableness of a party’s actions, with inviting a jury, in a criminal case, to find a witness credible and thus find the defendant guilty. Unlike the closing argument in *Lopez*, the prosecutor’s comments in the instant case were directed not at the reasonableness of C.F.’s actions, but at C.F.’s credibility. (See Tr., p.489, L.12 – p.490, L.2.) Thus, *Lopez*, where the Court held “golden rule” arguments are “only appropriate when used to ask the jury to assess the reasonableness of a party’s actions by relying upon their own common sense and life experiences,” 114 Idaho at 878, does not justify the prosecutor’s improper comments. The prosecutor’s comments were misconduct because they improperly appealed to the emotion, passion or prejudice of the jury through the use of inflammatory tactics. See *Gross*, 146 Idaho at 20-21.

Because the prosecutor’s comments vouched for the credibility of the prosecutor and investigating officer and appealed to the emotion, passion or prejudice of the jury by asking the jury to imagine themselves as the alleged victim, the prosecutor committed misconduct that violated Mr. Nelson’s constitutional right to a fair trial. As demonstrated above, the State’s arguments to the contrary are unavailing.¹

¹ The second prong of fundamental error review for prosecutorial misconduct asks whether the error plainly exists, without the need for any additional information not contained in the appellate record, including information as to whether the failure to

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Nelson respectfully requests that this Court vacate his conviction for sexual battery of a minor child sixteen or seventeen years old and remand the case for a new trial.

DATED this 1st day of March, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

object was a tactical decision. See *Perry*, 150 Idaho at 226. The State has not specifically addressed whether the misconduct asserted by Mr. Nelson plainly existed. (See Resp. Br., pp.4-11.) Thus, no further response on this point is necessary, and Mr. Nelson would direct the Court's attention to pages 18-19 of the Appellant's Brief.

The third prong of fundamental error review asks whether the misconduct prejudiced the defendant. See *Perry*, 150 Idaho at 226, 228. The State has only specifically addressed prejudice with respect to Mr. Nelson's assertion the prosecutor committed misconduct through appealing to the emotion, passion or prejudice of the jury by asking the jury to imagine themselves as the alleged victim. (See Resp. Br., p.11 n.1.) The State's argument on this point is largely unremarkable and generally addressed in Mr. Nelson's Appellant's Brief. Thus, no further response is necessary, and Mr. Nelson would direct the Court's attention to pages 19-20 of the Appellant's Brief.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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